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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-915

VERNON LEE BOUNDS, et al.,

Petitioners,

v.

ROBERT (BOBBY) SMITH, et al.,

Respondents.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents pray that a writ of certiorari not issue to review the judgment of the United States Court of Appeals entered on September 30, 1975.

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS RESTED ITS DECISION IN THIS CASE ON WELL ESTABLISHED AUTHORITY IN THIS COURT.

In holding that the State was denying respondents reasonable access to the courts and equal protection of the laws by failing to provide them access in some form to legal research facilities, the Court of Appeals properly relied on this Court's decision in Younger v. Gilmore, 404 U.S. 15 (1971), aff'g. Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970). The authority of Younger v. Gilmore for this proposition is not affected by the fact that it was decided as a summary affirmance of the decision of a three-judge court. "Votes to affirm summarily . . . are votes on the merits of a case.'" Hicks v. Miranda, 422 U.S. 332, 344 (1975); Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959). This Court has recently reaffirmed the validity of Younger v. Gilmore, citing it with approval and relying on it. In Wolff v. McDonnell, 418 U.S. 539 (1974), Justice White, writing for a unanimous Court on this point, reviewed Gilmore as follows:

> "Following Avery, the Court in Younger v. Gilmore, supra, affirmed a three-judge court judgment which required state officials to provide indigent inmates with access to a reasonably adequate law library for preparation of legal actions." Id. at 578-579.

See also Procunier v. Martinez, 416 U.S. 396, 419 (1974); Cruz v. Hauck, 404 U.S. 59 (1971); Smith v. Bennett, 365 U.S. 708 (1961).

The proposition settled by Gilmore has achieved a status of widely accepted doctrine. The decision of the Court of Appeals in this case is consistent with the decisions of all the other circuits that have passed on the question. Kirby v. Ciccone, 491 F.2d 1310, 1312 (1974); Noorlander v. Ciccone, 489 F.2d 642, 650-651 (8th Cir. 1974); Cruz v. Hauck, 475 F.2d 475, 477 (5th Cir. 1973); Novak v. Beto, 453 F.2d 661 (5th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971); Johnson v. Anderson, 370 F. Supp. 1373, 1383-1385 (D. Del. 1974); Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972). See also, Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975); Russell v. Oliver, 392 F. Supp. 470, 473 (W.D. Va. 1975). Not only is there thus no conflict in the circuits, there is not even a single federal judge who has taken a different position; there were no dissenting opinions on this issue in any of those cases.

Against this compelling authority, petitioners cite only Ross v. Moffitt, 417 U.S. 600 (1974). In Ross, this Court decided only that a state is not constitutionally required to furnish counsel to an indigent defendant beyond the first stage of appellate review. As the District Court held in this case, Supp. App. 23-24, that means that North Carolina is not required to provide an independent office of attorneys to counsel prisoners, but does not offset the requirement that the State provide the prisoners access in some form to legal research facilities. In Ross, this Court reaffirmed the duty of the State "to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Id. at 616. In deciding that that duty does not necessarily encompass free counsel at discretionary appeal stages, this Court was strongly influenced by the consideration that the defendant at such a stage already has the benefit of the work product of his appointed attorney upon his first appeal. Id. at 615. By contrast, the needs of the indigent prisoner supporting his claim for access to legal materials -- although including the usefulness of such materials to him at all stages of his appeal from his conviction -- include also original actions for habeas corpus or civil rights actions. Wolff v. McDonnell, 418 U.S. 539, 579-580 (1974). The fact that this Court only days after deciding Ross unanimously reaffirmed Gilmore in Wolff v. McDonnell demonstrates that Ross does not detract from the continuing validity of Gilmore. Indeed, by recognizing that North Carolina need not provide counsel to indigent prisoners beyond the first appeal, Ross emphasized the importance of legal materials to such uncounseled inmates.

As the District Court found, the record in this case establishes that North Carolina provides its prisoners with neither access to an adequate law library (in fact, they provide none at all except an inadequate one at one prison), nor an adequate alternative (in fact, they provide none at all). Supp. App. 6, 11. The petition for a writ of certiorari, at pages 9-12, makes a slight effort to suggest that North Carolina does provide an adequate alternative to law libraries for its inmates. None of the information cited in those pages is supported by the record in this case. Despite full opportunity to do so, petitioners never attempted to present any of this alleged information to the District Court, not even by affidavit. Much of that information is incorrect; much of it amounts to only the conclusions of counsel; and there is no basis for any of it in the record of this case. Petition 19. See Vette v. Virginia Department of Corrections, - F.2d - (4th Cir. February 27, 1976) (copy attached as Exhibit A to this brief); Cruz v. Hauck, 515 F.2d 322, 332 (5th Cir. 1975).

B. THE COURT OF APPEALS DECISION IN JARVIS V. NORTH CAROLINA COLLATERALLY ESTOPS PETITIONERS FROM CONTENDING THAT IT IS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE ITS PRISONERS ACCESS IN SOME FORM TO LEGAL RESEARCH FACILITIES.

In Jarvis v. North Carolina, Mem. Dec., Docket No. 73-2094 (4th Cir. March 27, 1974), a case in which some of the defendants were the same as some of those in this case, the Fourth Circuit held: "Jarvis' claims that he has been absolutely denied law books, if accurate, states a claim for relief if the prison system offers no adequate alternative." Id. at 5. A copy of that decision is attached as exhibit B to this brief.

Since the State did not seek review of that decision, it is final and binding on the State. By operation of collateral estoppel, the State is foreclosed from relitigating that issue. Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973); Federal Savings & Loan Insurance Corp. v. Hogan, 476 F.2d 1182,

1187 (7th Cir. 1973); Seguros Tepeyac, S.A. v. Jernigan, 410 F. 2d 718, 726-727 (5th Cir. 1969); Zdanok v. Glidden Co., 372 F. 2d 944, 953-955 (2d Cir.) cert. den. 377 U.S. 934 (1964); Bruszewski v. United States, 181 F. 2d 419, 421-422 (3d Cir.) cert. den. 340 U.S. 865 (1950). Thus, the State may not dispute the effect of Gilmore on this case. The District Court found that respondents have been absolutely denied law books and that the prison system offers no adequate alternatives. Supp. App. 6, 11. Thus, Jarvis is conclusive upon the issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1315

Charles R. Vette, et al.
All persons incarcerated in the
Virginia Correctional Field Units
as a Class Action,

Appellants,

v.

Virginia Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: January 22, 1976. Decided: Feb. 27, 1976

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

(Charles R. Vette, Appellant Pro Se; James W. Hopper, Assistant Attorney General, for Appellee.)

EXHIBIT A

PER CURIAM:

Charles R. Vette has appealed from the dismissal of a suit he initiated pursuant to 42 U.S.C. § 1983 alleging that his access to the courts has been unduly restricted by the failure of the Virginia penal system to provide inmates with legal research materials. After the district court's dismissal of Vette's action without a hearing, this court issued its opinion in Smith v. Bounds, No. 74-2378 (4th Cir. September 30, 1975), pet. for cert. filed December 29, 1975, in which we held that the state must accord a prisoner either "adequate legal research facilities" or "an acceptable legal assistance program." In their return, the respondents asserted they had "an acceptable legal assistance program." The order of the district court does not indicate that any finding to this effect was made or even that any evidence along this line was offered. The proceeding must accordingly be remanded for appropriate findings on this claim of the respondents. Of course, if the respondents do not make out this defense, then they must offer to provide the petitioner "adequate legal research facilities." What such "adequate legal research facilities" may be will depend to some extent on the particular manner in which the state operates its prison system.

Vette brought his action as a class action. According to Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975), a class

action may not be certified when a pro se litigant attempts to represent all other similarly situated prisoners. Thus, on remand the district court must consider the ability of Vette to bring the action in his own behalf and not as a class action.

Accordingly, we dispense with oral argument and remand to the district court for further proceedings in compliance with this opinion.

FILED

MAR 27 1974

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2094

Robert C. Jarvis,

Appellant,

v.

State of North Carolina and
Captain R. T. Joines, Defendants,
and V. Lee Bounds, Commissioner of
the N. C. Department of Correction;
North Carolina Department of Correction;
Additional Party Defendants,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow Jones, Chief Judge.

Submitted: February 25, 1974 Decided: MAR 27 1974

MEMORANDUM DECISION

Robert C. Jarvis, a state prisoner, filed a petition treated by the district court as a complaint pursuant to the Civil Rights Act, 42 U.S.C. § 1983. The petition and subsequent documents filed by Jarvis alleged that his constitutional rights had been violated in the following respects: (1) he had been punished for his writ-writing activities; (2) prison administrators intentionally interfered with his free access to the federal courts; (3) he had received inadequate dental treatment; (4) he had received inadequate medical care; and (5) he was confined in a facility so unsanitary

and unhealthy as to result in cruel and unusual punishment. The defendants filed affidavits and prison records to refute Jarvis' allegations, and prayed for summary judgment. The district court examined the documents filed by all parties, concluded that there was no genuine dispute as to any material fact, and granted the defendants' motion for summary judgment. Jarvis appeals. For reasons hereinafter set forth, we affirm in part, reverse in part, and remand for further proceedings.

Jarvis' first complaint is that he has been punished because of his writ-writing activities. He specifically complains that he had been transferred to five different prison facilities in approximately four months as punishment for bringing an earlier civil rights suit. The record reflects the following undisputed facts: Jarvis was convicted of the offenses for which he is currently confined in May 1972. On June 7, 1972, the United States District Court received from Jarvis a civil rights complaint directed against the Sheriff, Deputy Sheriff, and Sheriff's Department of Iredell County, North Carolina. On June 20, 1972, Jarvis appeared before the Central Classification Committee of Central Prison. The Committee recommended Jarvis' assignment to the Yancey County Subsidiary. On June 27, 1972, Jarvis was transferred to the McDowell County Subsidiary. (The record does not show whether Jarvis ever was, in fact, in custody at the Yancey unit.) On August 25, 1972, Jarvis was transferred to the Alexander County Subsidiary. Merely six days later, he was sent to the Western Correctional Center at Morgantown. On either October 25 or 26, 1972, Jarvis was transferred to the Caldwell County Facility at Hudson, N. C. The present complaint was initially filed on November 29, 1972. It further appears that since the commencement of this litigation, Jarvis has been transferred to the Watauga County

Subsidiary, though the date of this transfer does not appear in the record.

Jarvis alleges that he was continually moved about because he was known as a writ-writer. While the place of confinement of a prisoner and the transfer of an inmate from one prison facility to another are ordinarily matters within the discretion of penal authorities, we think it cannot be disputed that transfers may not be constitutionally employed as a weapon to punish or discourage the right of free access to the courts. See Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966). Accordingly, if Jarvis' claim is true, he is entitled to some meaningful relief.

In support of his contention, Jarvis recounts in an affidavit the following conversation with Captain T. R. Joines, Superintendent of the Caldwell County Subsidiary: "After I arrived at the Hudson Camp I was summoned for an interview with Captain Joines. I did not request the interview. At this time Captain Joines told me the reason no camp wanted me was because I was a writ writer and that no superintendent wanted a writer of writs in his camp. He told me this was why no camp wanted to keep me." Jarvis' account of the conversation is more than supported by Joines' own sworn version of what transpired: "That he told plaintiff that plaintiff was known as a writ writer and that no superintendent wanted one of those. That plaintiff admitted writing a few but had no reason to write one here. That he told plaintiff that he had been working in the Department for twenty-two years, that he knew right from wrong, and that he was not going to give the plaintiff grounds to write one. That if plaintiff did write a writ against him, he would probably be requesting that plaintiff be moved to another subsidiary or unit." (Emphasis added.)

In additional materials filed by defendants, Jarvis'

several transfers are said to have been caused by a change in his status from medium to honor grade, his inability to work on a road crew at one unit, his age, and the Department's desire to fulfill his request that he be transferred to a unit closer to his home. The district court apparently accepted as true these benign explanations for Jarvis' transfers, finding it difficult to see how his suit against the County Sheriff could so upset the Department of Corrections that they would transfer him from unit to unit in retaliation. While the district court may well be correct that the Department did not transfer Jarvis out of improper motivation, and that Joines' statement was simply improvident, we conclude that summary judgment was inappropriate. Viewing the evidence most favorably toward Jarvis, we cannot conclude that "it is quite clear what the truth is." Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627 (1944). The complaint raises a genuine issue of material fact -- the reason for Jarvis' transfers -- which was improperly resolved by a dismissal on the pleadings. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). An evidentiary hearing, with the traditional safeguard of adversary cross-examination, is necessary under the facts present here to resolve the controversy.

Jarvis' second claim is that prison administrators interfered with his access to the federal courts. He claims that at the Caldwell unit, law books are not permitted and inmates are not permitted to assist one another in legal matters. He also alleges that Joines warned him that "you better not write any writs on me and you better not write writs for anyone else in this camp, or give any advice to these inmates."

There is no doubt that Jarvis' contentions state a violation of constitutional rights which may be challenged by a suit pursuant to 42 U.S.C. § 1983. As the Supreme Court has stated,

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"it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Johnson v. Avery, 393 U.S. 483, 485 (1969). In that case, the Court struck down a Tennessee prison regulation which prohibited inmates from assisting and advising each other concerning writs of habeas corpus and other legal matters, in the absence of alternatives designed to furnish legal assistance to indigent prisoners. Similarly, Jarvis' claims that he has been absolutely denied law books, if accurate, states a claim for relief if the prison system offers no adequate alternative. Gilmore v. Lynch, 319 F.Supp. 105 (N.D.Cal. 1970), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971).

The district court granted summary judgment on the ground that Jarvis' own evidence and the record itself refute his contention that his access to the courts has been impaired. However, as counsel for Jarvis has observed, unconstitutional conduct designed to chill inmates' exercise of their right of access to the courts cannot be disregarded simply because the intimidation has failed. It should be obvious that if the filing of a suit is taken as proof that there has been no interference with a prisoner's right of access to the courts, the claim could of necessity never be established. Since material questions concerning the nature and extent of the defendants' interference with Jarvis' right of access to the courts have not been resolved, we conclude that summary judgment was inappropriate.

Jarvis' third complaint is that he has received inadequate dental treatment. While the record reveals that Jarvis is in need of dental care, the evidence fails to establish that defendants are or may be responsible for his lack of treatment. While Jarvis

claims that he was refused dental care at the Central Prison in June 1972 and that his appointments with private dentists were forced to be canceled because of his transfers, uncontradicted evidence submitted by defendants demonstrates that Jarvis received no prison treatment because he preferred private care. The Infirmary Administrator of the Central Prison Hospital submitted an affidavit stating that Jarvis refused an appointment and expressed a desire for private treatment. An appoincment with a private dentist was then made, at state expense, where X-rays were made and an estimate of the cost of the work prepared. An arrangement was then made that Jarvis would have the work done when he had accumulated sufficient funds in his prison trust account to cover the cost of treatment. The defendants' contention is that the work was not done because Jarvis never deposited sufficient funds in his account to assure the dentist of payment.

Jarvis has not disputed this version of events. While it may be that his transfers necessitated cancellations of one or two appointments, his difficulty getting dental care does not amount to a constitutional deprivation. Accordingly, the district court's grant of summary judgment on this issue is affirmed.

The fourth claim is that Jarvis received inadequate medical care. This claim arises from an incident where Jarvis experienced a two-day delay before he saw a doctor after he first requested one. During the interim period, he was kept in the sick room. Cough syrup and aspirin were administered by guards. We conclude that summary judgment against Jarvis was proper. While such a delay in medical treatment may violate constitutional rights under appropriate circumstances, Ritchie v. Chappell, 468 F.2d 1072 (6th Cir. 1972), Jarvis alleges no facts to support a conclusion

that the delay in this instance was deliberate or arbitrary, or that it amounted to cruel or unusual punishment.

Jarvis' final complaint is that he is being confined in conditions so unsanitary and unhealthy as to constitute cruel and unusual punishment. He recites a variety of evils, including that his prison dormitory is overcrowded and the beds only fifteen inches apart; that toilet facilities are inadequate and not in proper working order, subjecting inmates to a disgusting stench; that bedding is filthy and ragged; that food handlers are not required to keep clean and follow sanitary practices; that he is allowed only one change of clothes per week, even though the clothes become muddy and dirty while working; that inmates are compelled to work in the cold, rain and mud without boots or adequate winter coats; and that indigent inmates are denied toothbrushes, toothpaste and razors. Affidavits of prison officials deny some of these conditions, raising factual issues on Jarvis' allegations.

To allow relief under 42 U.S.C. § 1983, prison conditions must be so deficient as to infringe constitutional rights. Nevertheless, allegations of conditions potentially injurious to health not fundamentally different from the claims made by Jarvis have been considered by other courts to necessitate positive judicial inquiry. See, e.g., Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Ohio 1971); Lake v. Lee, 329 F.Supp. 196 (S.D.Ala. 1971). We conclude, therefore, that Jarvis' claim should not have been summarily dismissed. The district court is directed to make findings of fact concerning the nature of the conditions of which Jarvis complains, and to make conclusions of law concerning their permissibility under the Eighth Amendment.

Accordingly, the judgment and order of the district court is affirmed in part, reversed in part, and remanded for further

proceedings not inconsistent with this opinion.

United States Circuit Judge

United States Circuit Judge

United States Circuit Judge

CERTIFICATE OF SERVICE

I, Barry Nakell, one of the attorneys for respondents and a member of the Bar of the Supreme Court of the United States, do hereby certify that I served one copy of the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on counsel for petitioners, Mr. Jacob L. Safron, Special Deputy Attorney General, Justice Building, Raleigh, North Carolina 27602, by depositing the same on this date with the United States Postal Service, Chapel Hill, North Carolina, first class postage prepaid, addressed as aforesaid.

I certify that to the best of my knowledge and belief all parties required to be served have been served.

Date: March 15, 1976

/Barry Nakell

Barry Nakell
Attorney for Respondents